IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

STATES OF WEST VIRGINIA, **NORTH DAKOTA**, **GEORGIA**, and **IOWA**, *et al.*, Plaintiffs, v. **U.S. ENVIRONMENTAL PROTECTION AGENCY**, e*t al.*, Defendants.	Case No. 3:23-cv-00032-DLH-ARS Hon. Daniel L. Hovland

MEMORANDUM IN SUPPORT OF PLAINTIFF STATES' MOTION TO STRIKE PROPOSED INTERVENORS' RESPONSE IN OPPOSITION TO PLAINTIFF STATES' MOTION FOR PRELIMINARY INJUNCTION

A group of Indian Tribes has filed a response to the Plaintiff States' motion for preliminary injunction. *See* ECF 93. But the Court has not yet allowed those Tribes to intervene, and the Tribes cannot participate as parties until the Court does so. It would also be inappropriate to consider the Tribes' response *after* their pending motion to intervene is decided, as that consideration would delay the proceedings when the Final Rule's March 20 effective date is imminent. What's more, the Tribes' filing does not comply with the Local Rules. The Court should therefore strike the response.

BACKGROUND

On February 21, the States moved this Court for a preliminary injunction against the final rule titled, "Revised Definition of 'Waters of the United States,'" 88 Fed. Reg. 3004-3114 (January 18, 2023). The Final Rule goes into effect on March 20. The Court required the Agencies to file

a 30-page response to the States' motion by March 10, and the States must reply by March 14. ECF 78. More than two weeks after the States filed their motion, and nearly a month after this action was filed, the Tribes moved to intervene. ECF 87. Briefing on the motion to intervene is set to conclude on March 29. The Tribes, however, filed their own 30-page response to the pending preliminary-injunction motion on March 10. ECF 93.

ARGUMENT

"[A]ll courts have inherent authority to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Zerger & Mauer LLP v. City of Greenwood*, 751 F.3d 928, 931 (8th Cir. 2014). A court may strike a filing if it is "not in compliance with its orders." *McClurg v. Mallinckrodt, Inc.*, No. 4:12-CV-00361-AGF, 2017 WL 2880350, at *3 (E.D. Mo. July 6, 2017); *cf. Gen. Mills Operations, LLC v. Five Star Custom Foods, Ltd.*, No. CV 10-0015 (RHK/JJG), 2011 WL 13228124, at *2 (D. Minn. May 6, 2011) (relying on "inherent authority" to strike amended complaint filed without leave and in contravention of court order). The Court may also strike filings that do not comply with the Local Rules, including the rules governing page limits. *See, e.g., Allied Mach. & Eng'g Corp. v. Jewell Mach. & Fabrication, Inc.*, No. 413CV00078SMRRAW, 2013 WL 11616465, at *2 (S.D. Iowa July 17, 2013) (striking reply brief for failure to comply with page limits).

The Court should exercise its inherent authority here and strike the Tribes' response. Admittedly, it is unclear if the Tribes intended to file this document as a response for the Court's immediate consideration or merely a proposed response. The document is docketed as a separate event, is titled on the docket as a normal response, and refers to the Tribes as though they have already been granted permission to intervene. But the cover page also says "proposed response." Either way, the Court should not consider it.

If the document is not merely a proposed response, then the Court should strike it as premature. An intervenor has a right to participate in an action only when it can show that it satisfies the requirements for intervention and (with rare exceptions) after a court enters an order allowing it to take part. *See Conseco v. Wells Fargo Fin. Leasing, Inc.*, 204 F. Supp. 2d 1186, 1193 (S.D. Iowa 2002) ("A party, *once allowed to intervene*, may litigate fully as if it were an original party." (emphasis added)). The court's order on the motion to intervene then defines the scope of the intervenor's right to participate. *See Planned Parenthood Minnesota, N.D. v. Daugaard*, 946 F. Supp. 2d 913, 923 (D.S.D. 2013) (explaining that an intervenor could not take depositions when those depositions went beyond the interests that the intervernor was granted permission to intervene as to and protect). So while a "motion to intervene is pending," a movant's request to take part in the action as a party is "premature." *Wilson v. MRO Corp.*, No. 2:16-CV-05279, 2018 WL 7118191, at *1 (S.D.W. Va. Oct. 4, 2018).

Allowing the Tribes to file a response to the States' motion before the Court decides their motion to intervene would be inequitable and improper. Without a decision on the motion to intervene, there is no assurance that the Tribes have actually met the requirements for intervention, including standing. *See Wittman v. Personhuballah*, 578 U.S. 539, 544 (2016). So if the response is considered now, the States would need to respond to arguments that might become moot if the Court decides *not* to permit the Tribes to intervene. It is not obvious whether the States would need to use some of their already limited reply briefing—only ten pages—to address any new arguments from the Tribes. It is unknown when a reply to this response would even be due. Further, another group of interested organizations have asked to intervene in support of the States' challenge. *See* ECF 56. Yet their arguments on the need for a preliminary injunction have not been heard. Thus, if this response was meant to be considered right away (as it appears to be),

then the Court should strike it. Non-parties do not file responses to motions, and the Tribes are non-parties. *See W. Watersheds Project v. Zinke*, No. 1:18-CV-00187-REB, 2018 WL 4210774, at *4 n.5 (D. Idaho Sept. 4, 2018) (noting that a state "was not a party until it successfully intervened").

If the document is merely a proposed response, then the Court still should not consider it even after it grants the Tribes' motion to intervene (assuming, for the moment, that it will). The Tribes' motion to intervene will not be ready for resolution before the Final Rule's effective date. So the Court could consider the preliminary-injunction response after the motion to intervene is decided only if the Court then did one of two things: (1) push off the date for deciding the States' motion for preliminary injunction to allow the Tribes to properly lodge their response later; or (2) reconsider any decision in favor of the States at some later point.

The Court has already recognized why the first option is no real option at all: "[A]llowing the briefing schedule to conclude after the final rule takes effect would be prejudicial to the Plaintiffs." ECF 90 at 2. And in considering whether to allow a party to intervene at all, the Court must consider "the likelihood of prejudice to the parties in the action." *United States v. Ritchie Special Credit Invs., Ltd.*, 620 F.3d 824, 832 (8th Cir. 2010). As part of that analysis, the Court should also account for the "stage" of the proceedings. *Agrium Inc. v. Soo Line R.R.*, No. 1:13-CV-118, 2014 WL 12469972, at *3 (D.N.D. Feb. 21, 2014). Whatever the merits of allowing the Tribes to intervene at a later stage might be, the Court should not permit them to jump into *this* stage of the proceedings and upset a preliminary-injunction process that will be (and needs to be) resolved in just a few days' time. *See, e.g., Murdaugh v. Kitchens*, No. 3:22-CV-608-CMC, 2022 WL 18584354, at *1 (D.S.C. Mar. 21, 2022) (denying intervention because it would "unduly delay adjudication of the pending motion for preliminary injunction in this case").

As for the second option—considering the Tribes' response after the fact—the Supreme Court has foreclosed that course. Generally, "permission to intervene does not carry with it the right to relitigate matters already determined in the case." *Arizona v. California*, 460 U.S. 605, 615 (1983). That approach would only create more delay. Instead, an intervenor "must accept the proceedings as he finds them." *Sierra Club v. Espy*, 18 F.3d 1202, 1206 n.3 (5th Cir. 1994) (cleaned up). So giving Defendants a second shot at fending off a preliminary injunction by reopening the proceedings later on, for the Tribes' sake, would be improper.

All these issues aside, the Tribes' motion also does not comply with the Local Rules governing responses. Local Rule 7.1(B) provides that responses should be no longer than 20 pages. D.N.D. Civ. L.R. 7.1(B). The Tribes' response is 30 pages. The Tribes appear to have assumed that the Court's order granting Defendants an extension also applies to them. But by its terms, it does not. ECF 78. And the Tribes did not otherwise seek leave of court to file excess pages; had they done so, the States would have asked for a few additional pages of their own on reply, just as they did with Defendants' submission. "Local rules have the force of law, and parties are charged with knowledge of them." *Jones v. Johnson*, 186 F. App'x 691, 692 (8th Cir. 2006). Thus, for this independent reason, the Court should strike the Tribes' response.

CONCLUSION

For all these reasons, the Court should strike the Tribes' response to the States' motion for preliminary injunction.

Dated: March 13, 2023

Respectfully submitted.

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